
IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 22,709

UNITED STATES OF AMERICA,

Appellant,

v.

N. A. DEGERSTROM, INC., & BOWER MACHINERY CO.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

REPLY BRIEF FOR APPELLANT

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As we pointed out in our main brief, there are two separate reasons why this Court should reverse the judgment of the district court, which held the government liable to the Contractor for damage to the Contractor's equipment caused by the negligence of the Contractor's employee. First, the parties executed a contract which placed the risk of loss for this type of damage upon the Contractor. Second, apart from the contract, the Contractor's employee was not a common law "loaned servant" of the government in the circumstances of this case, and

therefore the government cannot be held liable for his torts.^{1/}

We find nothing in the Contractor's brief which casts doubt upon either of the above arguments. However, there is one proposition of law asserted in that brief which requires an answer.

Appellees devote less than four pages of their brief (pp. 15-18) to a discussion of Article 5 of the lease agreement. No mention is made of the purpose of this provision, which was clearly intended to apportion the risk of damage to equipment without regard to common law liability (Appellant's Brief, pp. 6-10). In answer to our contentions, the Contractor apparently urges (Appellees' Brief, p. 16) that 28 U.S.C. 2671 requires a contrary result. This argument is without merit.

That section provides, in part:

"Employees of the government" includes
* * * persons acting on behalf of a federal
agency in an official capacity, temporarily
or permanently in the service of the United
States, whether with or without compensation.

^{1/} The Contractor's brief (pp. 10-11) asserts that the government does not contest the trial court's findings concerning the government's exercise of control over the employee. On the contrary, at pages 10-17 of our main brief we argue that the government did not have such control as a matter of law. If this is held to be correct, of course, the trial court's findings would be "clearly erroneous."

We know of no authority for the proposition that this section precludes the government and a lessor of equipment from contractually apportioning the liability for damage to the equipment involved.^{2/} The case cited by the Contractor, Martarano v. United States, 231 F. Supp. 805 (D. Nev.), merely holds that the government may be held liable for the negligence of a loaned servant over whom it exercises complete control. We do not, of course, dispute this principle; we only urge that it does not apply here, since (1) the government did not exercise sufficient control over the Contractor's employee, and (2) even if it did, the Contractor agreed in Article 5 of the lease agreement to assume "full responsibility for the safety of his employees * * * and for any damage or injury done by * * * them," regardless of where common law liability would fall.

CONCLUSION

For the above reasons, and for the reasons stated in our main brief, the judgment of the district court should be reversed.

Respectfully submitted,

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2/ The intent of the quoted portion of the section was to include as a federal employee the "dollar a year man" or a similar person rendering temporary service to the government. See Gottlieb, The Federal Tort Claims Act -- A Statutory Interpretation, 35 Geo. L.J. 1, 11, n. 36.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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AFFIDAVIT OF SERVICE

DISTRICT OF COLUMBIA)
CITY OF WASHINGTON) ss.

STEPHEN R. FELSON, being duly sworn, deposes and says:

That on August 22, 1968, he caused three copies of the foregoing Reply Brief for Appellant to be served by air mail, postage prepaid, upon counsel for the appellee:

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Subscribed and Sworn to before
me this 20th day of August, 1968.

Mageline Johns
NOTARY PUBLIC